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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 25

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA and THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA.

Motion of American Civil Liberties Union of Southern California For Leave to File Brief Amicus Curiae and Brief.

A. L. WIRIN,
HUGH R. MANES,
257 South Spring Street,
Los Angeles 12, California,
Counsel for American Civil Liberties Union of Southern California, Amicus Curiae.

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No. 661

RAPHAEL KONIGSBERG,

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vs.

THE STATE BAR OF CALIFORNIA and THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA,

Motion of American Civil Liberties Union of Southern California for Leave to File Brief Amicus Curiae.

The American Civil Liberties Union of Southern California respectfully requests permission to file the within Brief *Amicus Curiae* in support of petitioner's Petition for Writ of Certiorari in the above entitled cause.

Counsel for the American Civil Liberties Union of Southern California, A. L. Wirin and Hugh R. Manes, have read the record at bar and have familiarized themselves with the arguments presented by the parties hereto. This Court granted leave to file such a brief when this petitioner was last here for review. (352 U. S. 914). We believe that there is need for further argument upon one of the points only touched upon by petitioner in his Petition.

The American Civil Liberties Union believes that freedom of opinion, expression and association are pre-requisites of a democratic and thoughtful body-politic. History holds bitter lessons for those who eagerly permit government intrusion upon the individual liberties of dissenters. But of equal concern to the Union is the stealthy encroachment by the State upon fundamental freedoms in the interest of expediency or in the name of privilege. At bar is a claim made by the State of California that it may deny petitioner a license to practice law solely because of his refusal to declare, under oath, whether or not he was or is a member of the Communist Party. We believe that this, in effect, constitutes the imposition upon petitioner of a loyalty oath,[1] the taking of which, however, is not conclusive evidence of non-criminal advocacy. On the other hand, the legislative history of political test oaths for lawyers in California, and the present posture of the law negates authority for respondents' position. Consequently, the respondents are denying petitioner admission to the State Bar under *ad hoc* rules, which, as this Court already has observed in this case, raises serious questions of due process.

However, it is not only petitioner's liberty and property rights which are at stake—substantial as they are. It is also the freedom of licensees who will follow under the precedent established by this case which is the concern of the Union. It is submitted, therefore, that the Com-

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[1]This Court has noted probable jurisdiction, in a loyalty oath case, *Nostrand v. Balmer*, 361 U. S. 873.

mittee of Bar Examiners had no absolute right or power to inquire into petitioner's beliefs and associations. Rather, its entry into this area should only be made when possessed of clear and convincing evidence of criminal conduct.

For the foregoing reasons, it is respectfully requested that the American Civil Liberties Union of Southern California be granted permission to file the within brief in support of Petitioner's position.

Counsel for the respondent has declined to consent to the filing of this brief; as he did, upon request so to do, therefore, in *Konigsberg v. State Bar, supra*, 352 U. S. 914; he has, however, suggested to the undersigned attorneys herein, in writing, that the request for leave to file the instant proffered brief *amicus* should be made directly to this Court and that he will not oppose the granting of the motion.[2]

Respectfully submitted,

A. L. Wirin and

Hugh R. Manes,

Attorneys for American Civil Liberties Union of Southern California.

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[2]Counsel for amicus herein were granted leave of Court to appear as amici by the Supreme Court of California. See decision of that Court herein "Exhibit C", Petition for Writ of Certiorari herein, page 5.

IN THE

Supreme Court of the United States

October Term, 1959.

No. 661

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA AND THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA.

Brief of American Civil Liberties Union of Southern California, Amicus Curiae, in Support of Petition for Writ of Certiorari.

Section 6064.1[1] of the California Business and Professions Code excludes from certification and admission to the State Bar anyone who advocates the overthrow of government by force and violence.[2] Petitioner has consistently denied that he does—or ever did—so, but has nonetheless been denied a license to practice law because of his refusal (on First Amendment grounds) to declare whether or not he was—or is—a member of the

[1] Section 6064.1, B & P Code: "No person who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, shall be certified to the Supreme Court for admission and a license to practice law."

[2] Section 6106.1, B & P Code: "Advocating the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, constitutes a cause for disbarment or suspension."

Communist Party.[3] Respondents take the position that petitioner's refusal to answer questions concerning such membership precludes a determination of whether or not he engages in criminal advocacy, and hence his eligibility to practice law in California.[4] *Amicus* believes that the burden of showing unlawful advocacy is upon the State, and that by attempting to shift this burden to petitioner, respondents have, in effect, imposed upon him a loyalty oath, thereby depriving him of his liberty and property without due process of law (*Speiser v. Randall*, 357 U. S. 523).

This case comes to the Court for the second time. In the original proceedings, petitioner was asked the same questions, and declined, for the same reasons, to answer them.[5] Respondents inferred from petitioner's silence that he did not possess the requisite good moral character, and assigned this as one of the three reasons for refusing to certify petitioner to the State Bar *Konigsberg v. State Bar of California*, 353 U.S. 252, 269-271). This Court reversed and remanded "for further proceedings not inconsistent with this opinion, noting, *inter alia*, that forty-two persons had attested to petitioner's excellent character, to his "belief in democracy and devotion to democratic ideas, his principled convictions, his honesty and integrity, his conscientiousness and competence in his work, his concern and affection for his wife and children and his loyalty to his country" (353 U. S. at p. 265) This Court also took cognizance

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[3]See among other places in the Record, pages 28-29 of the hearing of September 21, 1957—referred to hereafter as "1957 Hearing."

[4]1957 Hearing, pages 46-48.

[5]1957 Hearing, pages 28-31.

of petitioner's testimony "that he did not believe in nor advocate the overthrow of any government in this country by unconstitutional means" (353 U. S. at p. 271) and the fact that "no witness testified to the contrary" (353 U. S. at p. 271).

The record now before the Court in respect to petitioner's loyalty, integrity and devotion to American principles is different only in that it is amplified by further evidence adduced at the 1957 hearing held pursuant to the mandate of this Court and the Supreme Court of California,[6] Mr. Herbert Tobin, petitioner's employer for the two and one half years preceding the 1957 hearing, testified that:

> "I think he is probably the most honest man I have ever met . . . . His ethics and attitudes, his sincerity, his loyalty is beyond all reproach."[7]

Mr. Tobin was not cross-examined by the respondent Committee; and twelve additional written testimonials of similar import were received into evidence—none of whose authors were called upon by respondent committee for cross-examination.[8] Significant, too, is the concession by the State Bar that its investigator was unable to turn up any derogatory information against petitioner.[9]

Where petitioner's silence was formerly inferred by respondents as indicative of bad moral character, it is now treated as a frustration of inquiry. Yet, for whatever reason or motive, the result is the same: the State is denying petitioner admission to the Bar of Cali-

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[6]1957 Hearing, pages 14-19 and pages 56-57.

[7]1957 Hearing, page 17.

[8]1957 Hearing, pages 56-57.

[9]1957 Hearing, page 58.

fornia because he will not disclaim, under oath, past or present membership in the Communist Party, although such disclaimer would not be treated as conclusive evidence of non-criminal advocacy.

Freedom of speech and association are fundamental to a democratic society (*Wieman, v. Updegraff*, 344 U.S. 183, 188; *National Association for Advancement of Colored People v. Alabama*, 357 U. S. 449, 460-463). Such rights are guaranteed by the First Amendment to the United States Constitution speaking through the Fourteenth (*N.A.A.C.P. v. Alabama, supra*, p. 460), and are thus protected from abridgement by government unless and until confronted by an urgent and substantial interest of the State (concurring opinion of Justice Frankfurter, in *Sweezey v. New Hampshire*, 354 U. S. 234, 255 at p. 265).

Undoubtedly, loyalty oaths—and inquiries into one's associations and beliefs—restrict lawful activities (*American Communications Association v. Douds*, 339 U. S. 382, 393). For beliefs and associations which one fears may be questioned tomorrow, are not likely to be uttered today. Particularly is this true where the declarant bears the burden of proving the truth of his disclaimers (*Speiser v. Randall*, 357 U. S. 513).

As this Court pointed out in the *Speiser* case (357 U. S. at p. 525);

> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful from the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawful-

ness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proof and the generality of the standards applied, cf. Dennis v. United States, [341 U. S. 494], provide but shifting sands on which the litigant must maintain his position." (357 U.S. at p. 526).

Of course, the guarantees of the First Amendment are not reserved simply for popular opinions or harmless fraternal orders. Freedom signifies the right to hold and discuss views which question the very heart of the existing social order (*West Virginia Board of Education v. Barnette*, 319 U. S. 624, 642). And that right, having once been exercised, is not rendered less secure with the passage of time, or upon the subsequent ascendency of counterveiling ideas (*Konigsberg v. State Bar*, 353 U. S. 252; *Schware v. Board of Bar Examiners of New Mexico*, 353 U. S. 232). The First Amendment does not heed the changing climates of opinion.

It follows that free speech and assembly carry with it the freedom to be silent about such matters (concurring opinion, *Sweezey v. New Hampshire*, 354 U. S. 234, 255). Freedom less than this is misnamed.

Of course, the right of self-determination as to these freedoms is not absolute, but neither is it so fragile that it must be yielded to the State with the filing of an application for a license (*Konigsberg v. State Bar, supra; Schware v. Board of Bar Examiners, supra;* compare: *Wieman v. Updegraff*, 344 U. S. 183).

While it is true that no applicant may be certified to the State Bar who engages in criminal advocacy, it does

not follow that such applicant bears the proof of negativing such conduct. On the contrary, Rule X, section 101 of the Rules Regulating Admission to Practice Law, provides only that:

> "The applicant shall have the burden of proving that he is possessed of good moral character, of removing any and all reasonable suspicion of moral unfitness, and that he is entitled to the high regard and confidence of the public."[10]

That petitioner has carried this burden, and carried it well, has already been observed by this Court (*Konigsberg v. State Bar, supra,* at pp. 265, 266), and is apparent from the additional evidence offered by petitioner at the 1957 hearing.

On the other hand, the legislative history of section 6064.1 of the Business and Professions Code of California belies the notion that an applicant for a license to practice law was under a duty to disclose his political associations or beliefs, or make declarations of loyalty as a condition of admission. Indeed, political test oaths for lawyers have been repeatedly rejected by the legislature and have been consistently disapproved by the California State Bar, even as recently as this year.[11]

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[10]Chapter 4, Division 3 of the Business and Professions Code of California; approved by the Board of Governors of the State Bar of California, September 8, 1937, with amendments to January 1959.

[11]Los Angeles Daily Journal, Sept. 22, 1959, p. 1, reports that the conference of State Bar delegates at its annual meeting disapproved Resolution No. 1 which says: "Recommends that the State Bar Act be amended to provide that membership in the Communist Party is cause for disbarment." The same resolution was proposed at the October 1958 convention of the conference of State Bar delegates who refused to take any action on the resolution.

Thus, in 1949, State Senator Jack Tenney introduced into the California Senate, Senate Bill 298, which would have required every lawyer to swear that he did not advocate the forceful overthrow of government, and that he was not affiliated with any organization that did. This Bill was opposed by the State Bar,[12] and was ultimately defeated (Sen. J. p. 3748, July 2, 1949).

Again, in 1951, as national hysteria about, and fear of, political unorthodoxy was gaining momentum, California State Senator Hugh Burns introduced Senate Bill 1666, which called for every attorney to state under oath (1) that he did not engage in unlawful advocacy, (2) whether he was a member of an organization which so advocated, and (3) foreswearing that he would ever engage in such advocacy, or join an organization that did.[13] This Bill died in the California State Senate (Sen. J. Vol. III, p. 3977, 1951); and was supplanted by Assembly Bill 1683, which was enacted into law with the support of the Board of Governors of the State Bar,[14] and became sections 6064.1 and 6106.1 of the Business and Professions Code. Significantly, the test oath provisions of Senate Bill 1666 are omitted from both of the statutes.

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[12]State Bar Journal, Vol. XXIV, No. 4, July-Aug. 1949, p. 273.

[13]The Board of Bar Governors of the State Bar: "It was determined that the State Bar take no position on S.B. 1666 relating to the loyalty oath for attorneys." Vol. XXVI May-June, 1951, No. 3, p. 154.

[14]Vol. XXVI, May-June, 1951, No. 3, p. 156: "The Board approved the form of amendment of A.B. 1683, as part of the State Bar's legislative program, relating to advocating the overthrow of the government of the United States or of this state by force, violence, or other unconstitutional means, as preventing certification for admission to practice and as constituting a cause for disbarment or suspension."

In 1955, the State Bar Committee on Rules of Professional Conduct made several recommendations to compel disclosure of beliefs and associations (see: 29 Calif. State Bar Journal, 349 ff). Among these were proposals to discipline attorneys who personally advocated, or who were affiliated with organizations which advocated proscribed doctrines, and *attorneys who refused to answer questions relating to such speech and association.* The latter provision was incorporated within Assembly Bill 1800, but failed of passage (Calif. Assemb. final bal. 1955, p. 677).[15]

The foregoing legislative gloss on section 6064.1—as well as the language of that statute—seems to preclude respondents' contention that the applicant bears the burden of proving he does not engage in forbidden or criminal speech.

In *Speiser v. Randall, supra,* this Court held that California could not shift its burden of proving criminal advocacy by exacting a disclaimer from a taxpayer as a condition of receiving a benefit or gratuity from the State. Even so, the Court was dealing with a political test oath *enacted into statute* pursuant to a Constitutional provision proscribing the granting of tax exemptions to those who engaged in unlawful advocacy.

Here, however, no such statutory authority exists; and, in fact, has been specifically withheld. Yet, respondents seek to do that which it was held the State could not do even with the benefit of an enabling statute—namely, deny petitioner a license to practice law for mere

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[15]Two other bills introduced in the legislature that year, S.B. 1814 and A.B. 1903, which would have attached political conditions on the right to practice law in California were similarly unsuccessful (Sen. J. 1955, Vol. II, p. 4440; Assemb. J. 1955, Vol. III p. 5964).

refusal to disclose, under oath, his past and present associations.

This being a government of laws, it is manifestly a violation of due process for respondents to make up exclusionary rules as they go along (*Konigsberg v. State Bar, supra*, at p. 261). The burden of showing unlawful advocacy belongs to the State (*Speiser v. Randall, supra*, and the legislature has not here attempted to relieve the State of that burden. Since respondents have themselves found no evidence of criminal advocacy or association, petitioner is obviously under no duty to disclaim such conduct, or produce evidence in support of such disclaimers (*Speiser v. Randall, supra*). Especially is this so where the disclaimer is not conclusive evidence of non-advocacy (*Speiser v. Randall, supra*, at p. 528).

The First Amendment would be an innocuous document indeed if speech could be made the hostage of licensing bodies whenever it suited their whim or convenience. The injunction against unlawful advocacy no more justifies an inquiry into the political beliefs and associations of license applicants than it gives to the Secretary of State an inherent right to pry into the beliefs and associations of passport applicants (*Kent v. Dulles*, 357 U. S. 116), or than it entitles a State to abridge the privacy of churches or veterans who come to it for a favor (*First Unitarian Church of Los Angeles v. Coun' of Los Angeles*, 357 U. S. 545; *Speiser v. Randall, supra*). While the State may go far in placing upon an applicant to its Bar the burden of showing good moral character and fitness, its action here in withholding a license from applicant because of his refusal to reveal his political associations is arbitrary and capricious. Respondents have produced no evidence whatever that

petitioner's political activities have exceeded constitutional limits, such as would require from petitioner an explanation or rebuttal. There is therefore no compelling interest of the State which warrants infringement of petitioner's liberty or the deprivation of his property.

Conclusion.

For the foregoing reason, the petition for certiorari should be granted.

Respectfully submitted,

A. L. Wirin,

Hugh R. Manes,

Counsel, American Civil Liberties Union of Southern California, Amicus Curiae.

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